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No. 82-293

Supreme Court of the United States

OCTOBER TERM, 1982

NORTH SHORE UNIVERSITY HOSPITAL; FLORENCE FINCKE, ASSISTANT DIRECTOR, MATERNAL CHILD HEALTH CARE,

Appellants,

v.

STATE HUMAN RIGHTS APPEAL BOARD, STATE DIVISION OF HUMAN RIGHTS; ESSIE MORRIS,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF OPPOSING MOTION TO DISMISS

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Appellants North Shore University Hospital and Florence Fincke submit this brief pursuant to Rule 16.5 of the Revised Rules of this Court in opposition to appellees' motion to dismiss this appeal because:

(1) The appeal is within the Court's jurisdiction.

(2) Appellants have raised substantial federal questions.

Statutes Involved

1. The relevant provisions of 28 U.S.C. § 1257(2) are set forth in the Motion to Dismiss at 2.

2. The relevant provisions of the Human Rights Law are set forth in the Jurisdictional Statement at 4-5.

3. N.Y. Civ. Prac. Law § 5602(a)(1(i) and (b)(2)(i) (McKinney 1978) provides:

> (a) Permission of appellate division or court of appeals. An Appeal may be taken to the court of appeals by permission of the appellate division granted before application to the court of appeals, or by permission of the court of appeals upon direct application:
>
> 1. in an action originating in the supreme court, a county court, a surrogate's court, the family court, the court of claims or an administrative agency.
>
> (i) from an order of the appellate division which finally determines the action and which is not appealable as of right . . .
>
> (b) Permission of appellate division. An appeal may be taken to the court of appeals by permission of the appellate division:
>
> 2. in an action originating in a court other than the supreme court, a county court, a surrogate's court, the family court, the court of claims or an administrative agency.
>
> (i) from an order of the appellate division which finally determines the action, and which is not appealable as of right pursuant to paragraph one of subdivision (b) of section 5601, . . .

Counter Statement of the Case

Appellants' Statement of the Case is at 6-14 of the Jurisdictional Statement.

Appellees wrongly imply (Motion to Dismiss at 3) that Morris was assigned to a shift job despite available non-shift work elsewhere. The record does not show this. The record does show that the circumstances under which Morris was hired were satisfactory to her, and that for nine

years thereafter she never requested a transfer to another area not involving work on a revolving shift. The record further shows, and appellee Morris admits, that for that nine year period there were "no problems" regarding her Sabbath observance.

ARGUMENT

I

The Appeal Is Within The Court's Jurisdiction.

Appellees wrongly assert that this Court lacks jurisdiction because appellants could have obtained a decision from New York's highest Court by appealing "as of right" to the Court of Appeals pursuant to N.Y. Civ. Prac. Law § 5601(b)(1). Appellants examined this question in the course of the proceeding below and learned, as set forth in 7 Weinstein, Korn & Miller, New York Civil Practice (1981), ¶ 5601.9, that:

> A prime source of difficulty in applying the language of paragraph 1 of CPLR 5601(b) has been in determining whether a constitutional question is "directly" involved. The Court has read the term "directly" to mean that the question must be necessarily" involved in the Appellate Division's decision.

The Court of Appeals, in *Matter of Haydon* v. *Carroll*, 225 N.Y. 84 (1918) stated (p. 88):

> The appellant who relies upon [§ 5601(b)(1)] for his appeal assumes that burden of presenting to us a record which establishes that such construction (of the Constitution of the State or of the United States) has been not only directly but necessarily

> involved in the decision of the case. *If the decision was or may have been based upon some other ground, the appeal will not be.* (Emphasis supplied)

Weinstein, Korn & Miller, *supra,* further states that (pp. 56-25—56-26):

> [T]he problem is present whenever the Appellate Division's decision could have been reached on some ground, such as statutory construction, that would not require resolution of the constitutional question. If resolution of both the constitutional and the non-constitutional question was essential to the Appellate Division's decision, then the constitutional question was "directly" and "necessarily" involved and appeal will lie of right even though the record does not disclose the Appellate Division's reasoning. *When, on the other hand, the decision could rest independently on either ground, the appeal does not lie unless it appears from the record that the Appellate Division rested its decision only on the constitutional ground. If the record is silent, or if it discloses that the Appellate Division rested its decision on the non-constitutional ground or on both grounds, the appeal will not lie; . . .* (Emphasis supplied; citations omitted)

The Appellate Division, Second Department in deciding the instant matter* rested its decision on non-constitutional grounds. In fact no reference to constitutional grounds are found in the Court's decision other than the statement that it "considered petitioners' remaining contentions and find them to be without merit." Hence, an appeal as of right to the Court of Appeals was unavailable to appellants.

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* Jurisdictional Statement 6a-7a.

Accordingly, because appellants had no appeal as of right, they instead sought permission, of both the Appellate Division and the Court of Appeals, to appeal to the Court of Appeals pursuant to N.Y. Civ. Prac. Law § 5602(a)(1)(i) and (b)(2)(i). Such permission was denied.* Neither decision indicates that permission to appeal was denied because the case was appealable as of right. (See for example, *Unger* v. *Village of Falconer*, 2 N.Y.2d 731 (1956) and *Augstein* v. *Levey*, 2 N.Y.2d 902 (1957) (where motions seeking permission to appeal to the Court of Appeals were denied on the ground that appeals were available as of right).

Therefore, Appellants have exhausted the New York State remedies available to them in accordance with 28 U.S.C. § 1257(2) and the instant appeal may properly be heard by this Court.

II

The Appeal Presents Substantial Federal Questions.

In the second argument of their Motion, appellees rely on *Rankins* v. *Commission on Professional Competence*, 24 Cal.3d 167 (1979), *appeal dismissed*, 444 U.S. 986 (1979) to contend that New York Human Rights Law Section 296.10 on its face raises no substantial Establishment Clause question. This reliance is misplaced because that case could have been decided on grounds independent either of a Free Exercise Clause or Establishment Clause inquiry.

The *Rankins* court construed the California State Constitution to require reasonable accommodation of religious beliefs to the extent presented under the circumstances of

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* Jurisdictional Statement at 2a and 1a.

that case. The reasonable accommodation duty is otherwise undefined. There, a teacher (Thomas Byars) could have been accommodated without burden or cost because he did not work a revolving shift, substitute teachers were available at no additional cost, a separate statute required that he be given leave, and other teachers were permitted the absences denied him.

Thus, the California Supreme Court reasoned, on those facts a reasonable accommodation requirement was implicit in the State constitutional provision under examination which to that extent did not violate the First Amendment's Establishment Clause.

Moreover, the sincerity of Byars' religious beliefs was not at issue. *Id.* at 167. Therefore, this Court's denial of the appeal in *Rankins* does not automatically dispose of an Establishment Clause question such as presented here, and *Nottelson* v. *Smith Steel Workers D.A.L.U. 19806*, 643 F.2d 445 (7th Cir. 1981), *cert. denied*, —— U.S. ——, 70 L.Ed.2d 488 (1981) did not so hold.

A constitutional issue arises if the court is required to determine whether the beliefs allegedly disregarded by the employer were religious. See *Gavin* v. *Poples Natural Gas Company*, 464 F. Supp. 622, *rev'd* 613 F.2d 482, 484-485 (3rd Cir. 1980). The New York Statute in question on its face requires such an inquiry.

Appellees next argue that Section 296.10 as applied to appellants does not transgress the First Amendment because Morris allegedly could have been accommodated without "substantial" costs (Motion to Dismiss at 6-7). Appellees base this contention on the premise that appellant Hospital had "nine years notice of Morris's Sabbath requirement during which it could have assigned her to the clinic to safeguard her Sabbath observance."

First, the record shows that not only was the legitimacy of appellee Morris' purported Sabbath requirement not free from doubt (Jurisdictional Statement 12-13) but also that the nine years went by without a problem as to her Sabbath observance (Jurisdictional Statement at 7). An accommodation duty cannot arise in a vacuum, as appellees' 20-20 hindsight process wrongly presupposes. Appellant had no reason to transfer appellee Morris during the nine years because there was no evident problem before it to resolve. Hence, once the problem did arise, there was a far greater barrier to accommodation than an exemption from a simple work rule, because no openings existed into which appellee Morris could be transferred.

Finally, appellees argue that the statute's "plain meaning" coupled with its legislative history gives employers ample notice of their duties under it. Appellees mistakenly contend that because of *Sherbert* v. *Verner*, 374 U.S. 398 (1963) and *Schweizer Aircraft Corp.* v. *State Division of Human Rights*, 48 N.Y.2d 294 (1979), anyone should know that the Sabbath observance of a Seventh Day Adventist requires abstention from work from sundown on Friday to sundown Saturday (Motion to dismiss at 7-8). However, since the employers in those cases were not hospitals, it was not revealed that the requirement to abstain from work does not apply to health care institutions (Jurisdictional Statement at 13).

Appellees further urge (Motion to Dismiss at 9) that the Bill Introducers and Governor Rockefeller sufficiently clarified the term "indispensable" as used in Section 296.10 (b). However, the Memorandum of Bill Introducers, 1967 N.Y. Sess. Laws 1486 (McKinney) states that "[T]his exclusion is intended to cover sports coaches or other specialized activities where the job cannot be performed by another person." No clue is provided as to why sports coaches

should be any more indispensable than anyone else, thus deepening the mystery of this statute.

Appellees then, in discussing the "health or safety" exception to the statute, section 296.10(c), quote only Governor Rockefeller's Memorandum of Approval (Motion to Dismiss at 10) which tracks the Memorandum of Bill Introducers (*supra* at 1487) with the significant omission of the all-inclusive "etcetera" found in the Memorandum of Bill Introducers. There, the exception was described as including "police and firemen, *etc.* . . . Appellants contend that the exception reasonably could include health care workers such as appellee Morris, increasing the statute's ambiguity. Since " 'men of common intelligence must necessarily guess its meaning,' " this statute must be struck down. *See Hynes* v. *Mayor of Oradell,* 425 U.S. 610, 620, 96 S.Ct. 1755, 1760, 48 L.Ed.2d 243 (1976) (quoting *Connally* v. *General Constr. Co.,* 269 U.S. 385, 391 (1926).

Finally, appellees wrongly assert that appellants "made no effort" to accommodate appellee Morris, and therefore cannot claim denial of due process (Motion to Dismiss at 10). This misstates the record, which shows that when appellants learned of Morris' difficulty, they tried to find a solution short of bumping another employee from a job (Jurisdictional Statement at 11-12).

CONCLUSION

For these reasons, appellees motion to dismiss should be denied and this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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